STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TONY PETRICH, Charging Party,	)	Case No. LA-CE-2399
v.	)	PERB Decision No. 632
RIVERSIDE UNIFIED SCHOOL DISTRICT, Respondent.	)	August 26, 1987

Appearance; Tony Petrich, on his own behalf.

Before Hesse, Chairperson; Porter and Shank, Members.

DECISION

HESSE, Chairperson: Tony Petrich appeals the attached ruling by an administrative law judge (ALJ) on the motion of the Riverside Unified School District (District) to dismiss the allegations that the District violated the Educational Employment Relations Act (Gov. Code sec. 3540, et seq.) by refusing to hold certain grievance meetings, by docking Petrich's pay without notice, and by changing Petrich's work schedule without negotiating with the exclusive representative.

We have reviewed the entire record in this case, and the record in related cases as urged by Petrich, and we find the decision of the ALJ to be correct in all respects.[1] We

[1]Member Porter would also affirm the dismissal on the basis that an individual employee lacks standing to assert a unilateral change in policy based on the collective bargaining agreement. (Riverside USD (1986) PERB Decision No. 571, dis. opn.; Riverside USD (1986) PERB Decision No. 562a, dis. opn.)

therefore adopt his decision as the decision of the Board itself.[2]

ORDER

The unfair practice charges in Case No. LA-CE-2399 are hereby DISMISSED.

Members Porter and Shank joined in this Decision.

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[2]We find no evidence in the record of any bias or prejudice by the ALJ, and thus we reject any notion that his decision is flawed due to bias.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TONY PETRICH, Charging Party, v. RIVERSIDE UNIFIED SCHOOL DISTRICT, Respondent.	Unfair Practice Case No. LA-CE-2399 PROPOSED DECISION ON RESPONDENT'S MOTION TO DISMISS (4/28/87)

Appearances: Tony Petrich, on his own behalf; Best, Best & Kreiger, by Charles D. Field, for Riverside Unified School District.

Before: Martin Fassler, Administrative Law Judge.

INTRODUCTION AND PROCEDURAL HISTORY

This case concerns four allegations by an employee of the Riverside Unified School District (District) that the District unilaterally changed its past practice in four incidents in which the charging party/employee was involved. Two of these had to do with the handling of grievances which the employee, Tony Petrich, filed; a third had to do with the District's withholding of a certain portion of Petrich's monthly pay, because of an absence from work; the fourth had to with a change of Petrich's working hours.

With respect to the first three of these, the charging party alleges that the District's actions constituted violations of provisions of the collective bargaining agreement between the District and California School Employees

Association (CSEA), the union which represents the District's classified employees, including Petrich. The District contends that its actions did not constitute either violations of the collective bargaining agreement or changes in its past practices. Further, the District argues that the charging party failed to prove in each instance that the District's action was evidence of a new policy having a generalized effect or continuing impact upon the bargaining unit.[1]

The initial charge in this case was filed by Tony Petrich on May 22, 1985, (as unfair practice charge LA-CE-2188) and was amended several times. The charge included numerous allegations of unlawful actions by the District in a series of separate incidents. A complaint based on some of these allegations was issued in August 1985. At the same time, the specific allegations of this case were initially dismissed

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[1]Government Code section 3541.5 defines PERB's authority to issue unfair practice complaints, and describes certain limits on that authority. Paragraph (b) of that section provides:

> The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violations of such an agreement that would not also constitute an unfair practice under this chapter.

In Grant Joint Union High School District (1982) PERB Decision No. 196, the Board held it would not find an unlawful unilateral change of working conditions by an employer if the evidence showed a deviation from contractual requirements but there was no evidence that the deviation represented a new policy that would have a generalized effect or continuing impact on employees in the bargaining unit.

by PERB's regional attorney.

The charging party filed exceptions to these dismissals with the Board itself. On May 16, 1986, in PERB Decision No. 562a, the Board ordered issuance of a complaint based on the four specific allegations of this case. The general counsel thereafter issued a complaint, which was amended in minor ways on June 3, 1986. The substantive allegations of the complaint were that the District had unlawfully made unilateral changes in its past practices in the following ways: (1) By refusing to hold a Level 2 grievance conference with respect to a grievance that Petrich had filed on February 7, 1985; (2) By refusing to hold a Level 1 grievance conference with respect to a grievance Petrich had filed on March 8, 1985; (3) By withholding (or "docking") a certain portion of Petrich's pay on April 30, 1985, because of Petrich's absence from work, without conferring with Petrich before doing so; and (4) By altering Petrich's working hours in June 1985 without first negotiating with CSEA about the change.

A hearing on the allegations was held before the undersigned on October 22, 1986. At the end of the presentation of evidence by the charging party, respondent moved for dismissal of the complaint on the grounds that the charging party had failed to present evidence sufficient to establish a prima facie case with respect to any of the four allegations of the complaint. Both parties indicated their

desire to brief the matter prior to a ruling. Each party-submitted a brief on the motion in mid-January.

On February 27, 1987, the undersigned, by letter, advised the parties that the hearing would be reopened for the purpose of taking additional evidence on the allegation concerning the District's practice with respect to providing notice to employees prior to the docking of pay for unauthorized absence. The parties were advised that the hearing was to resume April 10, 1987, at the PERB office in Los Angeles.

On April 10, counsel for the respondent and the undersigned were present at the PERB office at the time designated for the resumption of the hearing, but charging party did not appear, nor did any representative on his behalf. Nor did charging party provide to PERB on April 10 or since then any explanation for his absence. Because of the absence of the charging party on April 10, no further evidence was taken. On April 16, an Order was issued closing the hearing.

FINDINGS OF FACT

Tony Petrich was a gardener-custodian employed by the District for several years prior to the events at issue in this case, all of which took place during 1985. Prior to February 25, 1985, Petrich worked at Woodcrest Elementary School; after that date, he worked at North High School.

A. The Level 2 Conference: Grievance of February 7, 1985.

The collective bargaining agreement in effect during 1985 between the District and Riverside Chapter #506 of CSEA included a four-step grievance procedure. The contract required that at Level 1, the employee (or CSEA on the employee's behalf) submit the grievance in writing to the employee's immediate supervisor. The supervisor was to then meet with the employee and/or a CSEA representative "in an attempt to resolve the matter." The immediate supervisor was then to provide a written response to the grievance.

If the grievance was not settled to the satisfaction of CSEA at Level 1, the contract provided for a notice of appeal to be served by CSEA within ten days after disposition of the grievance at Level 1, thus bringing the grievance to Level 2. The grievance would then be discussed at a meeting which included the employee affected, a representative of CSEA and the District superintendent, or a person designated by the superintendent to be present at the conference.

The contract did not allow an individual employee to take a grievance to Level 2; this right was reserved for CSEA. Also, while the contract specifically provided for the affected employee to be present at the Level 2 meeting, it did not indicate which party - CSEA or the District - had the responsibility for arranging for the employee to be present.

CSEA senior field representative Alan Aldrich testified that as a general rule both the District and CSEA notified an

individual grievant of the place and time that a Level 2 meeting was to take place. (Hearing Transcript, page 163).[2]

On February 7, 1985, Petrich filed a grievance about a letter to Petrich from Woodcrest Elementary School principal Dr. M.A. Sund. The letter itself is not in evidence.

Petrich's grievance was the following:

> Dr. Sund's derogatory communication, earmarked for Grievant's Personnel file, alleging Grievant was 10 minutes late to work on January 7, 1985 and insubordinate over a pile of tree leaves is incorrectly dated 1984. Said derogatory communication, now the subject of an Unfair Practice Charge, should be dated "1985." Said material should have been placed in Grievant's Personnel file 6 days after notification, not 10 days as indicated on said material.

As remedies, Petrich asked that the Sund letter be removed from his personnel file, and that the District provide him with four sets of Level 2 grievance forms.

On February 15, Sund, as Petrich's immediate supervisor at the Woodcrest School, denied the grievance. On the grievance form, she noted that she had already corrected the date. She noted that she had also given Petrich four copies of the Level 2 grievance forms. The remainder of the remedy sought by Petrich - removal of the critical letter from his file - was denied.

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[2]Hereafter, references to the hearing transcript will be in the form "TR:___," with the page number inserted.

On February 22, Carlos Corona, the grievance chairperson of the CSEA chapter, filed a Level 2 grievance about the matter.

Petrich alleges that the District did not hold a Level 2 conference with respect to this grievance, and that this alleged failure constitutes a unilateral change of the District's practice.

The evidence establishes that the conference was held. The District's assistant superintendent for personnel, Frank Tucker, testified that he held the Level 2 conference with Corona, CSEA field representative Alan Aldrich, and principal Sund. CSEA chapter president Gary Prince may have been there as well, Tucker testified. (TR: 43-44). According to Tucker, the Level 2 hearing took place one afternoon at 3:00 p.m., immediately preceding a settlement conference in a PERB case that also involved Petrich, at 3:30 p.m, at the same place. Other evidence establishes that the meetings took place March 7, 1985, at District headquarters.

Petrich called as witnesses neither Corona nor Sund. Aldrich testified that he did not attend a Level 2 grievance meeting that day, although he did attend the later PERB settlement conference. He testified he did not know whether a Level 2 conference had been held that day with respect to Petrich's grievance, although he knew that a number of Level 2 grievance conferences had been held during early 1985 in connection with grievances filed by Petrich.

Prince testified that he attended the 3:30 PERB settlement conference, but did not attend a grievance conference that day. He testified that he arrived at the District headquarters before 3:30, and was aware that some meeting concerning CSEA was taking place, but he did not know whether it was the Level 2 conference for the grievance at issue here (TR: 70-72).

Despite the apparent conflict between Aldrich's testimony and Tucker's testimony concerning Aldrich's presence at the Level 2 grievance meeting, I credit Tucker's testimony that a Level 2 meeting took place in connection with the February 7 grievance at 3:00 p.m., on March 7. I do so primarily because of Tucker's demeanor. He delivered his testimony with great certainty and confidence. I note also that in charging party's brief opposing the motion to dismiss, Petrich acknowledges that the March 7 meeting took place, and argues only that the District unilaterally changed its practice of informing the individual grievant of the time and place of the grievance meeting, and arranging for the individual employee to be present for the meeting. In any event, Tucker was quite certain in his recollection that a Level II meeting was held in connection with the February 7 grievance, and that it was held at 3:00 p.m. immediately preceding a PERB settlement conference in another matter involving Petrich, CSEA and the Distict.

I also credit Aldrich's testimony that he did not attend a Level II grievance conference that day, while he did attend, at

3:30, a PERB settlement conference. It appears, then, that Tucker accurately recalled seeing Aldrich that afternoon, but mistakenly recalled seeing him at the 3:00 p.m. meeting (the grievance meeting) when in fact he saw Aldrich at the 3:30 meeting (the PERB meeting).

Aldrich testified that he knew of no evidence that after the incident in question the District had failed or refused to hold Level 2 meetings in connection with other grievances (TR: 164).

B. The Level I Conference: Grievance of March 8, 1985.

On March 4, 1985, Tucker sent Petrich a memorandum describing events which had taken place early that afternoon. According to Tucker's memorandum, he returned from lunch that day shortly before 1:00 p.m. His secretary had not yet returned from lunch. Tucker found on his desk a letter from Petrich, responding to an earlier memorandum from Tucker.

A few minutes later, Petrich arrived at Tucker's office. Tucker told Petrich that Petrich was never again to enter Tucker's office unless Tucker himself was present in the office. According to Tucker's memorandum, Petrich acknowledged that he understood this instruction. Later that day, Tucker sent Petrich a memorandum repeating the same instruction.

Petrich filed a grievance alleging that this memorandum was in violation of a portion of section 18.1 of the collective bargaining agreement, specifically a portion which begins with

the phrase, "Nothing shall prohibit. . . ." No sentence of section 18.1 begins with those exact words. There is a sentence of that section which begins with the words, "Nothing contained in this Article shall be construed to prevent any individual employee from discussing a problem with an agent of the District and having it resolved without filing a grievance as provided herein." Petrich's grievance asked, as a remedy, that the March 4 memorandum by Tucker be removed from his file.

Petrich gave his grievance form to North High School plant supervisor Phillip Hodnett, his immediate supervisor. Hodnett apparently consulted with the school principal, Douglas Wolf, about how to respond to the grievance. Wolf, in turn, consulted with Tucker about how to handle the grievance. Tucker told Wolf to simply relay the grievance to Tucker, who would handle it as a Level 2 grievance. He also told Wolf to alter the initial form submitted by Petrich, so that it would be marked "Grievance Form - Level II," rather than "Grievance Form - Level I." Wolf followed Tucker's instructions.

On March 12, Tucker wrote to Petrich:

> I have scheduled an appointment to meet with you on Thursday, March 21 at 3 p.m., in my office to hear your grievance which was filed on March 8, 1985 with Principal Doug Wolf.

The only other evidence presented by Petrich in connection with this allegation was Hodnett's statement that although he was Petrich's immediate supervisor at the time the grievance

was filed, he declined to hold a Level 1 conference about the grievance because there was nothing that he, Hodnett, could do to bring about a remedy of the kind Petrich sought: removal of the March 4 memorandum written by Tucker.

Aldrich testified that on occasion the District and CSEA agreed in writing to waive a Level 1 or Level 2 meeting in connection with a specific grievance, or to modify, with respect to a particular grievance, a specific time requirement of the contractual grievance procedure. (TR: 159-160). Aldrich testified he knew of no agreement between the District and CSEA to waive the Level 1 meeting with respect to Petrich's March 8 grievance.

C. The Docking of Pay for Absence

Article XIX of the collective bargaining agreement entitled "Disciplinary Action and Dismissal Procedures," includes several provisions relevant to this allegation of unlawful action. The pertinent portions of Article 19 include the following:

> 19.0 . . . The District may suspend with pay, suspend without pay, reduce employee's hours, dock pay for absence without authority, or discipline employees in other appropriate manners to correct or remediate an employee's unsatisfactory performance or behavior.
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> • • •
>
> 19.1 Right to Request Hearing: A permanent employee has the right to request an informal hearing with the immediate supervisor prior to disciplinary action and/or dismissal. If requested, such a hearing will be held.

> 19.2 Right to Suspend: The District retains the right to suspend a permanent employee, with or without pay, without warning when the health and/or welfare of students or other employees is endangered by the continued presence of the employee, and/or where the employee's presence is a danger to the property of the District or others, and/or in cases of aggravated insubordination. . . .
>
> 19.3 Causes: Causes for disciplinary action shall include, but not be limited to the following:
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> 19.3.7 Absence without leave which may include any, any combination of, or all of the following: frequent tardiness and/or other failure(s) to report to the assigned place of work at the assigned time; inexcusable and unauthorized absence from the District; . . .
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> 19.4 Notification: Employees shall receive written notification of District intention to suspend without pay or dismiss prior to such District action in all cases other than those situations set forth in section 19.2, above. . . .

Other provisions of the article (sections 19.5 and 19.6) describe the hearing procedure for employees challenging disciplinary actions imposed on them.

Do these contract provisions, taken together, establish a practice by which the District is obligated to provide an employee with notice prior to the docking of pay for unauthorized absence?

To answer this question, the first consideration is whether the docking of pay for unauthorized absence is to be considered disciplinary action. The District contends it is not, but the more logical inference is that the parties to the contract

intended it to be viewed as a form of disciplinary action. Section 19.0 lists various forms of discipline. It indicates the District may " . . . dock pay for absence without authority, or discipline employees in other appropriate manners. . . ." Further, section 19.3 provides:

> Causes for disciplinary action shall include, but not be limited to the following: . . .
>
> 19.3.7 Absence without leave. . . ."

It may be inferred, then, from a reading of these sections, **that** the parties understood that absence without leave would be cause for discipline under the contract, and that the docking of pay would be one form of discipline which might be imposed for absence without leave.

The next question is: did the parties intend to impose upon the District an obligation to give an employee facing such discipline prior notice of the District's intention to impose that discipline?

Section 19.4 of the contract provides that prior written notification by the District of intention to impose discipline on an employee must be given with respect to intention to suspend without pay or to dismiss.[3] No other form of

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[3]In section 19.2, the contract provides for imposition of discipline without prior warning (notice) when the health and/or welfare of students or other employees is endangered by the continued presence of the employee, and/or where the employee's presence is a danger to the property of the district or others, and/or in cases of aggravated insubordination.

discipline is specifically mentioned in this section. It may be inferred from the absence of any such reference that the contract does not require prior written notification with respect to the District's intent to impose other forms of discipline, including the docking of pay.

However, section 19.1 appears to provide an employee covered by the contract a right to request an informal hearing with the immediate supervisor prior to imposition of any disciplinary action. An inference may be drawn that this applies to all forms of discipline because of the absence of any language which would limit the right to a hearing to only certain forms of disciplinary action.

If the contract entitles an employee to an informal hearing before imposition of discipline, it must be inferred the employee is entitled to prior notice. Without prior notice, the entitlement to a prior hearing would be meaningless.

Taking together sections 19.1 and 19.4, it is inferred that the parties to the contract intended that an employee facing the imposition of discipline other than suspension without pay or dismissal is entitled to prior notification of the District's intention of imposing discipline upon him or her, but is not entitled to prior written notification. Presumably, the employee is entitled to prior oral notification.

This requirement is not explicit in the contract, but it is the most logical inference to be drawn from a reading of the contract.

Alan Aldrich, CSEA senior field representative, who was negotiator for CSEA during the 1982 negotiations which led to the collective bargaining agreement, testified about the negotiations about Article 19, but his testimony did not cast any additional light on the intent of the parties on this point. Aldrich recalled that section 19.1 was carried over intact from the predecessor agreement between CSEA and the District. He recalled no discussion of the section during the 1982 negotiations.

Aldrich also testified that, as a general rule, disputes about employee discipline under the contract are handled by CSEA and the District through the process described by sections 19.5 and 19.6, but he could recall no instance in which he participated in the informal supervisor hearing described by section 19.1. (TR: 109, 111)

The charging party did not present any evidence concerning the District's actions in April 1985, regarding the docking of pay at issue. During the first day of hearing, October 22, the Administrative Law Judge (ALJ) ruled that Petrich would be required to first present evidence regarding the District's past practice regarding notice prior to the docking of pay; the contract provisions taken alone were deemed at that time to be insufficient evidence in this respect.

The ALJ's February 27 letter, made it clear that the purpose of the April 10 hearing would be to receive evidence concerning changes made in the District's practice regarding

provision of notice prior to the docking of pay.[4] As indicated above, however, the charging party chose not to appear at the resumption at the hearing, or to present at that time any evidence concerning changes in the District's past practice. Since no such evidence was presented during the first day of the hearing, in October 1986, the record includes evidence about the District's practice on this point, as defined by the collective bargaining agreement, but no evidence about the changes which the District is alleged to have made in its practice.

[4]The letter included the following:

> I have concluded that the taking of additional evidence is warranted in connection with only one aspect of the case, that concerning the withholding of pay for unauthorized absence.
>
> I will re-open the hearing solely for the purpose of allowing Mr. Petrich to present additional evidence on this point, and also allowing the District to present evidence with respect to this allegation. . . .
>
> I believe that the various provisions of the discipline article of the CSEA collective bargaining agreement do establish a contractual requirement that the District provide employees with prior notice of intent to dock pay for unauthorized absence. Given this conclusion, it is appropriate to allow the charging party to present evidence concerning the alleged change in this practice.

D. The Change of Work Hours - June 21, 1985

From the time Petrich began working at North High School in February 1985 until late June 1985, his working hours were generally 7:00 a.m. to 4:00 p.m., with an unpaid one-hour lunch break. Sometime before June 21, North High School plant supervisor Phil Hodnett circulated a memorandum to District employees at the high school altering the working hours of a number of employees. The memorandum required all gardeners to work from 6:00 a.m. to 2:30 p.m., with a 30-minute lunch break at 11:00 a.m. The District stipulated that CSEA was not notified of this change of hours, or given an opportunity to negotiate about it.

The collective bargaining agreement does not have any provision which deals specifically with the starting and ending times of employee work shifts, with a single exception not applicable here.[5] The contract section pertinent to the length of lunch hours provides that employees shall have an unpaid uninterrupted lunch period of no less than one-half hour and no more than one-hour.

Hodnett testified that throughout his 12-year tenure with

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[5]The exception is in section 10.13:

Summer Work Shifts: Whenever possible, without disrupting or interfering with the regular workflow of the District, the work shifts of Maintenance and Operations employees assigned to the warehouse shall begin at 7:00 a.m. between July 1 and August 31 inclusive. Individual exceptions to this provision may be made by the District.

the District, summer work hours for gardeners have been altered to provide an earlier starting time, a shorter lunch period, and an earlier ending time than is the case during the regular school year. The change is made partly for the benefit of employees, who then work during the early morning cool hours, and avoid the necessity of working additional time during the hotter summer afternoons. Hodnett testified the same practice had been followed at other District schools at which he worked, first as a custodian, and then as supervisor (TR: 133). Generally, the summer hours have been approximately the same as those designated for 1985: from 6:00 a.m. until 2:30 p.m., with a 30-minute lunch period.

DISCUSSION AND ANALYSIS

A. The Alleged Failure to Hold a Level 2 Meeting in Connection with the February 7 Grievance

It has been found that Tucker, on March 7, 1985, held a Level 2 meeting with Corona and Sund in connection with the grievance filed by Petrich on February 7, 1985. Petrich was not present. The reason for this absence is not clear. Tucker testified that he notified CSEA of the time and place of the meeting, and did not recall notifying Petrich independently of the meeting time and place. Petrich chose not to testify at all; thus, there is no evidence concerning his recollection of whether he was notified about the time and place of the meeting. Of the various CSEA agents, Corona was the person most likely to have had the responsibility for notifying

Petrich about the meeting; Corona was not called to testify. Prince and Aldrich, both of whom testified, credibly denied having any direct responsibility for handling the grievance.

On these facts, the allegation of an unlawful unilateral change of past practice must be dismissed. Any one of several analytical paths leads to this conclusion.

First, the facts support the conclusion that a Level 2 meeting was held; thus, there is no factual basis for a conclusion that the District failed to hold the meeting required by contract, thereby changing a past practice.

Alternatively, it might be argued that the contract requires the presence at a Level 2 meeting of the employee affected by the grievance. In the absence of the employee, it might be argued, the meeting is void and the District has not fulfilled its obligation to hold a Level 2 meeting. But this last conclusion stretches the meaning of the contractual language unreasonably. If the absence of an affected employee, in itself, were enough to invalidate a Level 2 meeting, and to require the repetition of the meeting, the possibility of abuse (through voluntary absence of the employee) is apparent. In addition, no evidence was introduced to suggest that the parties interpreted the Level 2 provisions this way.

Aldrich indicated that as a matter of practice both the District and CSEA took steps to bring about an affected employee's attendance at a Level 2 grievance meeting. No evidence was presented during the hearing about the efforts

which CSEA might have made to arrange for Petrich's attendance at the Level 2 meeting held in early March.

The pertinent facts, then, are these: the contract does not place sole responsibility on either CSEA or the District to arrange the affected employee's attendance at the meeting; the practice was for both CSEA and the District to notify the employee of the meeting. While there is evidence that the District did not notify Petrich of this particular meeting, the reason for Petrich's absence remains unclear, since Petrich did not himself testify about whether CSEA told him about the meeting, nor did he call Corona to testify about notification efforts Corona may have made on behalf of CSEA. In these circumstances, it is unreasonable to impose sole responsibility for Petrich's absence on the District, and invalidate a meeting which the District and CSEA representatives attended in good faith.

To summarize this analysis: a Level 2 meeting was held; Petrich's absence from the meeting, alone, is insufficient to invalidate the meeting. There is no evidence that the District was contractually responsible for Petrich's absence, and there is no legal reason for holding the District solely responsible, as a general rule, for attendance of affected employees at a Level 2 meeting. Thus, the District fulfilled its obligations with respect to a Level 2 meeting, and no unilateral change took place.

Finally, there is a third reason to dismiss the allegation of an unlawful unilateral change in the District's practice. Even if it were to be concluded (contrary to the conclusion here) that the District had violated the contract terms by failing to hold a Level 2 meeting, or by failing to hold a Level 2 meeting with Petrich in attendance, there is no evidence that this single violation was a change of generalized effect or continuing impact.

As noted on page 2 above, EERA section 3541.5 prohibits PERB from issuing a complaint based on a conduct which is solely a contract violation, and not a unilateral change of practice. In Grant, supra, the Board held that employer actions which did not have a generalized effect or continuing impact on members of the bargaining unit would not be found to be unilateral changes in conditions. At most, these might be contract violations, these determinations to be made in the fashion dictated by the contract itself (typically, through an arbitration procedure).

Petrich offered no evidence that the District explicitly stated an intention to by-pass the contractual requirement of a Level 2 meeting, or to by-pass the requirement that the affected employee be permitted to attend the meeting. Nor did Petrich present any evidence from which it might be inferred that the District had embarked on a new policy with respect to Level 2 meetings, and that in following this new policy the District refused to hold Level 2 meetings on other grievances.

Even if Tucker's evidence were to be rejected, and a factual finding made that no Level 2 conference took place, there is no evidence to support a conclusion that this action was anything other than a single contract violation.

B. The Failure to Hold the Level 1 Meeting in Connection With the Grievance of March 8.

The evidence shows, and the District acknowledges, no Level 1 meeting - attended by Petrich and Petrich's immediate supervisor - was held in connection with the grievance filed March 8. The District argues in its brief that portions of Tucker's testimony prove that the District had a practice of not holding a Level 1 meeting if the immediate supervisor was not in a position to provide a remedy of the kind sought by the grievant. While that would be a reasonable approach to Level 1 meetings, Tucker's testimony on this point consists of no more than a casual remark, without specifics of any kind. Insofar as the testimony is offered to prove a general pattern, I do not credit it.

Aldrich's testimony is slightly more specific and it is credited. Aldrich testified that on occasion the District and CSEA agreed, in writing, to waive a Level 1 hearing or a Level 2 hearing for a particular grievance, or to extend a contractual deadline with respect to a specific grievance.

Contrary to the District's argument, then, I find that the established practice in the District was to hold a Level 1 meeting in response to a grievance, pursuant to the contractual

requirement, unless the requirement was waived in writing by CSEA.

There is no evidence that CSEA agreed, in writing or otherwise, to waive the Level 1 meeting with respect to Petrich's March 8 grievance.

While there is evidence that the District failed to comply with the contractual requirement of a Level 1 meeting, there is no evidence that the District thereby adopted a new practice or policy with respect to Level 1 meetings generally. Petrich introduced no evidence with regard to any other grievances other than his own February 7 grievance, in which a Level 1 meeting apparently was held. Certainly the failure to hold a Level 1 meeting in this case had no generalized effect or continuing impact: Tucker agreed to consider the grievance at a Level 2 meeting very quickly after it came to his attention.

Thus, it must be concluded that the District's action in this respect is no more than a single violation of a contractual provision, rather than a unilateral change of practice. The allegation that the District's action in this respect represents a unilateral change of a past practice will be dismissed.

C. The Alleged Failure to Provide Notice Prior to the Docking of Pay on April 30

As stated in the findings of fact, on pages 11-14 above, the provisions in the contract, taken together, provide sufficient evidence to establish a past practice with respect

to notice to employees prior to the imposition of discipline less than suspension without pay or dismissal. While the complaint alleges that the District altered this practice on or about April 30, 1985, the charging party presented no evidence regarding any change which might have occurred at that time.[6] Because of the absence of such evidence the allegation of a unilateral change in past practice will be dismissed.

D. The Alteration of Working Hours for the Summer, 1985

Employees' working hours are within the scope of representation. As a general rule, employers are required to negotiate about the matter with the union representing the employees whose hours are to be determined, or to be altered. EERA section 3543.2; Palos Verdes Peninsula Unified School District (1979), PERB Decision No. 96.

As noted above, there is nothing in the collective bargaining agreement referring to the starting times and ending times of employees in the CSEA-represented unit, other than one reference affecting a specific group of employees which does not include Petrich.

Despite the absence of reference to starting times and ending times in the contract, the statutory obligation to negotiate changes in the hours of work applies to the District

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[6]The circumstances surrounding that failure to present such evidence are described on pages 4 and 15-16 above.

during the period of the contract. The District stipulated that it did not give CSEA notice of the change in working hours directed by Hodnett, nor an opportunity to negotiate about the change.

The facts set out establish a prima facie case of a unlawful unilateral change of working hours. However, the evidence introduced also establishes a valid defense to the charge. The District had a long-standing and open practice of altering the working hours of gardeners during the summer. For several years, during the summer recess, the District's gardeners were required to begin work earlier in the day than during the normal school year, and to finish earlier. The District's practice, according to Hodnett's credible testimony, was to set summer hours from approximately 6:00 a.m. until approximately 2:30 p.m., the hours which Hodnett set for North High School gardeners, including Petrich, in June 1985. Nothing in the collective bargaining agreement between CSEA and the District required the District to abandon this practice.

Since the District's action in June 1985 was consistent with its past practice in this regard, the District cannot be found guilty of having unilaterally altered a past practice. Pajaro Valley Unified School District (1978) PERB Decision No. 51; Rio Hondo Community College District (1982) PERB Decision No. 279, at pp. 17-19.

PROPOSED ORDER

The allegation of the complaint, as set out in paragraphs 4 and 5, that in February 1985 the respondent unilaterally changed a past practice by its refusal to hold a Level 2 conference for a grievance filed by the charging party February 7, 1985, is hereby dismissed.

The allegation of the complaint, as set out in paragraphs 6 and 7, that the respondent unilaterally changed a past practice by its refusal to hold a Level 1 grievance meeting in connection with a grievance filed by the charging party on March 8, 1985, is hereby dismissed.

The allegations of the complaint, as set out in paragraphs 8 and 9, that on or about April 30, 1985 the respondent changed its practice with respect to giving an employee prior notice of its intention to withhold a portion of the employee's pay because of unauthorized absence, is hereby dismissed.

The allegation of the complaint, as set out in paragraphs 10 and 11, that the respondent unilaterally changed a past practice by changing the working hours of the charging party beginning June 21, 1985, is hereby dismissed.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a timely statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions

should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305, and 32140.

Dated: April 28, 1987

MARTIN FASSLER
Administrative Law Judge